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Criminalization of participation in an organized criminal group

Criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime)

Background paper by the Secretariat

I. Introduction

1. At its meeting held in Vienna from 28 to 30 October 2013, the Working Group of Government Experts on Technical Assistance recommended, inter alia, that the United Nations Office on Drugs and Crime (UNODC) should expand the knowledge base on legislative and administrative measures to combat transnational organized crime, including by preparing issue papers on provisions of the United Nations Convention against Transnational Organized Crime.[1] The present paper is prepared in furtherance of that recommendation and also integrates the responses by States to the omnibus self-assessment checklist on the Organized Crime Convention.[2]

2. The purpose of the Organized Crime Convention, as stated in its article 1, is to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention seeks to encourage countries that do not yet have provisions against organized crime to adopt comprehensive countermeasures and to provide guidance for States in approaching the legislative and enforcement

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[1] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

[2] In March 2013, a note verbale was circulated to all Member States, inviting them to transmit to the Secretariat the completed omnibus self-assessment checklist. By 12 May 2014, seven responses (from Armenia, Bahrain, Lebanon, Mexico, the Republic of Korea, the Russian Federation and Ukraine) had been received.

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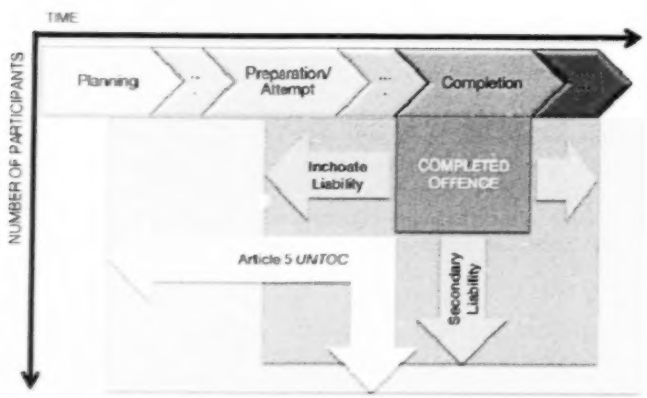
questions related to countering transnational organized crime. The Convention also seeks to eliminate safe havens for organized criminal groups by promoting greater standardization and coordination of national legislative, administrative and enforcement measures in order to ensure a more efficient and effective global effort to prevent and suppress transnational organized crime.

3. An important means for achieving these goals is the criminalization of participation in an organized criminal group, pursuant to article 5 of the Convention. The present background paper provides an overview of the purpose, content and scope of that provision. After an analysis of the different aspects of article 5, the paper also highlights a number of issues and challenges related to its implementation.

II. Purpose, content and scope of article 5

4. The main purpose of article 5 of the Organized Crime Convention, to be implemented by all States parties, is to establish an offence that creates criminal liability for persons who intentionally participate in or contribute to the criminal activities of organized criminal groups. The offence is aimed at tackling organized crime at its core by criminalizing acts that involve participation in or contributions to an organized criminal group. Article 5, paragraph 1 (a), is designed to be preventive, by creating liability "distinct from the attempt or completion of the criminal activity" and holding criminally liable those who associate for criminal endeavours, even if they have not yet committed an offence. Article 5 thus broadens the spectrum of criminal liability beyond the established parameters of inchoate and secondary liability, that is, liability that arises before and without completion of the criminal offence and liability for multiple persons acting together (see figure below). Article 5 extends criminal liability to situations in which crime is anticipated and likely to occur, but a specific offence has yet to materialize, and it applies to groups of persons acting in concert to commit serious crime.

Figure
Spectrum of criminal liability



5. Another purpose of article 5 is to extend criminal liability for different ways in which a person may participate in the commission of a serious crime involving an organized criminal group, including as organizers, directors, founders, financiers, participants or supporters. Importantly, States parties that implement article 5, paragraph 1 (b), are able to hold accountable those who plan, mastermind, organize, direct or actively support the criminal activities of an organized criminal group but who themselves do not commit, or have not yet committed, a specific criminal offence.

6. Article 5 serves to reduce the risk that criminal offences will be committed, thus minimizing the potential for harm to occur, and seeks to criminalize conduct that has the potential to culminate in harm or damage, as well as to enhance law enforcement, prosecution and adjudication and to enable criminal justice agencies to intervene earlier without having to wait until harm or damage is done.

A. Definitions

7. The offences set out in article 5, paragraph 1, of the Convention build on the definition of the term "organized criminal group", which is used throughout the Convention. Article 2, paragraph (a), of the Convention defines an "organized criminal group" as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

8. This definition combines elements relating to the structure of the group with those relating to the objectives of the group. The definition does not require proof of any actual criminal activities having been carried out by the organized criminal group (see table 1 below).

Table 1
"Organized criminal group", as defined in article 2 (a) of the Convention

Terminology	*Elements*
Structure	Structured group[a]
	Three or more persons
	Existing for a period of time and acting in concert
Activities	No elements defined
Objectives	To commit serious crimes[b] or offences established in accordance with the Convention
	To obtain a financial or material benefit

[a] As defined in article 2, paragraph (c), of the Convention.
[b] As defined in article 2, paragraph (b), of the Convention.

9. The structural requirements of this definition involve a "structured group of three or more persons, existing for a period of time and acting in concert". The term "structured group" is further defined in article 2, paragraph (c), to mean "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its

membership or a developed structure". The term "acting in concert" also suggests that there is some connection and coordination between persons involved in the group and that they are not operating in isolation.

10. The objective of the organized criminal group is to commit "one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". Article 2, paragraph (b), of the Convention defines the term "serious crime" to mean "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". The definition is thus both connected and limited to groups intending to commit offences that attract a very substantial penalty under domestic law. The offences which qualify as "serious offences" are left to States parties to determine.

B. Scope and application

11. According to article 3, paragraph 1, the Convention applies "to the prevention, investigation and prosecution" of Convention offences, including offences under article 5, and to serious crime "where the offence is transnational in nature and involves an organized criminal group".

12. Article 3, paragraph 2, limits the application of the offences under article 5 to "transnational" organized crime, i.e. to offences that occur across international borders. The Convention thus applies and can be used as a basis for international cooperation when the offence is transnational. Article 34 of the Convention further stresses that the criminalization of participation in an organized criminal group in domestic laws shall not require the conduct to be transnational in nature, so that the offences implemented pursuant to article 5 are to exist and apply in situations that do not involve a cross-border component.

13. As an international treaty that needs to be adaptable to the systems, traditions and needs of individual States parties, the Convention does not determine set penalties for the offences under article 5. To offer guidance and ensure that States parties adequately recognize the seriousness of organized crime, article 11, paragraph 1, indicates that penalties for a Convention offence should take into account the gravity of the offence. Article 26, paragraphs 2 and 3, encourages States parties to consider mitigating the sentence or granting immunity from prosecution to persons who cooperate with the authorities in the investigation or prosecution of organized crime.

III. Offences related to participation in an organized criminal group

14. Article 5, paragraph 1 (a), of the Convention offers States parties a choice between two offences that criminalize involvement in an organized criminal group:

(a) An offence that is based on an agreement to commit crime;

(b) An offence for participating in the activities of an organized criminal group.

15. These two alternatives reflect the different traditions and developments in civil- and common-law jurisdictions and allow States parties to choose the offences best suited to their domestic legal systems.[3] The offence contained in article 5, paragraph 1 (a)(i), builds on the conspiracy offences that are recognized across most common-law jurisdictions. The participation offence under subparagraph (ii), sometimes referred to by its French name, *association des malfaiteurs*, may be more suitable for civil-law countries, many of which do not permit the criminalization of mere planning and agreement without any physical activity in furtherance of the agreement.[4]

16. The scope and application of the two offences are not completely identical. It is for this reason that the Convention does not set them out as mutually exclusive alternatives. Instead, States parties may adopt either or both types, and several jurisdictions have indeed implemented both models concurrently. While the adoption of both models adds flexibility and provides a greater scope of criminalization, it may also create considerable overlap and result in confusion for those enforcing and applying the two offences.

A. Article 5, paragraph 1 (a)(i): the agreement model

17. Liability for the offence in article 5, paragraph 1 (a)(i), of the Convention is based on an agreement to commit serious crime. The design of this offence is, for the most part, identical with conspiracy offences found in most common-law jurisdictions, where the concept of conspiracy can be traced back to the early seventeenth century. However, the Convention does not use the term "conspiracy".

18. Put simply, the conspiracy offence criminalizes agreements between two or more persons to commit an unlawful act where there is an intention to commit that unlawful act. The rationale of conspiracy is based on the view that, if one person agrees with another about the commission of a crime, this increases the likelihood that a crime will be committed and that further crimes may follow. In many jurisdictions, especially those following common-law traditions, the doctrine of conspiracy is a tool for creating liability for persons involved in organized criminal groups, especially those who plan or organize the criminal activities and delegate their execution.

19. One purpose of the conspiracy offence is to extend liability "backwards" by criminalizing the planning (or agreement) stage of a criminal offence (see figure following para. 4 above). Conspiracy creates criminal liability even if no preparation of the contemplated offence has begun. The offence thus serves to prevent crime and allows criminal justice agencies to intervene (and enables charges to be laid) some time before an offence is actually attempted or completed.

20. The criminalization of conspiracy has a further purpose in that it allows for prosecution of multiple persons involved in a criminal enterprise. The offence

[3] See footnote 12 of the draft of the Convention dated 12 December 1998 (A/AC.254/4).

[4] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, New York, 2004), para. 49.

attaches liability to agreements to commit crime, which enables the prosecution of persons who organize and plan crime but do not themselves execute those plans.

21. The elements of the offence under article 5, paragraph 1 (a)(i), combine the agreement to commit a crime with the purpose of obtaining a financial or other benefit. In essence, liability under article 5, paragraph 1 (a)(i), arises when two or more persons deliberately enter into an agreement to commit a serious crime for the purpose of obtaining some material benefit. Unlike liability for attempt in the common-law tradition, there is no requirement to demonstrate that the accused came close ("proximate") to the completion of the substantive offence (or "serious crime").

22. For criminal liability to arise, the material or physical elements (actus reus) of article 5, paragraph 1 (a)(i), require proof of the following:

(a) An agreement to commit a serious crime (as defined in article 2, paragraph (b));

(b) That the agreement was between two or more persons (that is, the offender with at least one other person);

(c) Where required by domestic law, an overt act in furtherance of the agreement.

23. The mental or fault elements (mens rea) under article 5, paragraph 1 (a)(i), require proof that:

(a) The purpose of the agreement or the crime committed was to obtain a financial or other material benefit;

(b) The intention of the accused was to enter into the agreement (see article 5, paragraph 1, chapeau).

See table II below.

Table II
Elements of article 5, paragraph 1 (a)(i)

Type of element	*Element*
Physical/material elements (actus reus)	Agreement to commit a serious crime
	Agreement between two or more person(s)
	Where required, an overt act in furtherance of the agreement
Mental/fault elements (mens rea)	Intention to enter into the agreement
	Purpose of obtaining a financial or other material benefit

24. The offence under article 5, paragraph 1 (a)(i), centres predominantly on the agreement to commit a serious crime as defined in article 2 of the Convention. The agreement must be made between at least two persons; an agreement with oneself is not possible. Jurisprudence suggests that, while the agreement cannot exist without communication between the conspirators, there is no requirement that the parties to the agreement know each other. All that is required is that each conspirator is

committed to the agreed objective(s).[5] There is no requirement regarding the level of involvement of a conspirator in the agreement. The agreement may envisage that all conspirators equally take some action towards the agreed goal, but a conspirator may also be part of the agreement without carrying out any action aimed at achieving the common objective.

25. The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be executed. To prove the existence of a conspiracy, it must be shown that the conspirators were acting in pursuit of a criminal purpose held in common between them. This requirement is reflected in the chapeau of article 5, paragraph 1, which expressly states "when committed intentionally".

26. The Convention makes an important addition to the general common-law concept of conspiracy by requiring that the purpose of the agreement between the conspirators be to obtain a financial or material benefit. This element is reflective of the overall objective of the Convention and one of the main characteristics of organized crime, which is to achieve material gain from criminal activity. The effect of this added requirement is that it eliminates from article 5, paragraph 1 (a)(i), those conspiracies which are aimed at committing non-profitable crimes. Material benefits are interpreted quite broadly, however, and may also include non-financial advantages such as sexual gratification.[6]

27. Jurisdictions are divided over the requirement to prove some overt physical manifestation that is to take place after the agreement. Some jurisdictions add the "overt act" element to the offence to ensure that it covers instances in which the conspirators actually put their plans into action, so that agreements that are no more than bare intent or wishful thinking do not fall within the spectrum of criminal liability.[7]

28. Article 5, paragraph 3, of the Convention accommodates those jurisdictions which require proof of an overt act in furtherance of the agreement under their domestic law. The experience of those countries which have adopted the "conspiracy model" set out in article 5, paragraph 1 (a)(i), has shown that most conspiracy charges are based on evidence of an overt act, even if this is not a formal requirement. In practice, it is difficult to prove the existence of an agreement if no physical manifestation of the agreement has occurred, and law enforcement agencies generally may not become aware of a conspiracy until a positive act follows the agreement.

29. Article 5, paragraph 2, recognizes that in many legal systems it is permissible to use circumstantial evidence to establish the elements of criminal offences. This applies in particular to not only the mental elements but also to the agreement itself. Accordingly, the purpose, intention or agreement elements

[5] See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, 3rd ed. (Thomson Reuters, 2010), pp. 416-424.

[6] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 59.

[7] For example, most jurisdictions in Australia and the United States of America require that at least one of the parties to the agreement commit an overt act pursuant to the agreement. In contrast, in Canada and New Zealand, under English common law, the overt act is not a formal requirement of conspiracy. In these jurisdictions, liability for conspiracy may also arise without any physical manifestation of the agreement between the conspirators.

of article 5, paragraph 1 (a)(i), may be inferred from objective factual circumstances, thus lowering the threshold of the burden of proof placed on the prosecution.

B. Article 5, paragraph 1 (a)(ii): the participation model

30. Subparagraph (ii) of article 5, paragraph 1 (a), of the Convention offers a second, distinct type of offence that is based on the *association de malfaiteurs* laws developed in several civil-law countries. This model is inspired by articles 416 and 416bis of the Italian Penal Code, which were introduced in 1982 to criminalize the role of members in an organized criminal group.[8] In contrast to the conspiracy offence under subparagraph (i) of article 5, paragraph 1 (a), the offence under subparagraph (ii) adopts a model that makes the participation in an organized criminal group a separate offence. In essence, subparagraph (ii) attaches criminal liability to intentional contributions to organized criminal groups, not to the pursuit of a preconceived plan or agreement.

31. The offence in article 5, paragraph 1 (a)(ii), is based primarily on the participation of the accused in the activities of an organized criminal group, not on any agreement between members of the organization.

32. The physical elements of article 5, paragraph 1 (a)(ii), require that the accused have been "taking an active part in" either (a) the criminal activities of the organized criminal group; or (b) other activities of that group.

33. The mental elements of article 5, paragraph 1 (a)(ii), require that the accused had:

(a) An intention to take an active part (article 5, paragraph 1, chapeau); and

(b) Knowledge of either:

(i) The aim and general criminal activity of the organized criminal group; or

(ii) The intention of the organized criminal group to commit crimes.

34. If the participation relates to other, non-criminal activities of the organized criminal group, article 5, paragraph 1 (a)(ii)(b), further requires proof of knowledge that such participation will contribute to achieving the criminal aim.

35. According to article 5, paragraph 2, the intention and knowledge required under article 5, paragraph 1 (a)(ii), may be inferred from objective factual circumstances.

[8] A further influence in the development of article 5, paragraph 1 (a)(ii), can be found in the moves within the European Union in the late 1990s to agree on a framework for greater harmonization of laws to counter organized crime. In 1998, a joint action on making it a criminal offence to participate in an organized criminal group in Member States of the European Union (98/733/JHA) was issued. This document is widely considered to have provided the first internationally agreed upon definition of a criminal organization. The joint action also provided a codification of the offence of participation in a criminal organization.

Table III
Elements of article 5, paragraph 1 (a)(ii)

Type of element	*Element*
Physical/material elements (actus reus)	Taking an active part in: (a) The criminal activities of an organized criminal group, or (b) Other activities of that group
Mental/fault elements (mens rea)	Intention to take an active part Knowledge of: (a) The aim and general criminal activity of the organized criminal group, or (b) The intention of the organized criminal group to commit crimes If the participation relates to other, non-criminal activities of the organized criminal group: Knowledge that such participation will contribute to achieving the criminal aim

36. Liability under article 5, paragraph 1 (a)(ii), requires that an accused "takes an active part in" certain activities of an organized criminal group (as defined in article 2, paragraph (a)). This renders the participation "distinct from [criminal offences] involving the attempt or completion of the criminal activity", as required by article 5, paragraph 1 (a). The participation of the accused may be (a) in the group's criminal activities, or (b) in other, non-criminal activities if the accused knows that his or her contribution will contribute to achieving a criminal aim. This may include persons who commit a criminal offence in pursuit of the aims of, or on behalf of, the organized criminal group but also persons who operate legitimate front operations in support of an organized criminal group or who provide services such as bookkeeping, knowing that such conduct contributes to the achievement of the criminal aims of the group.[9]

37. The mental elements of article 5, paragraph 1 (a)(ii), restrict liability to persons who intentionally participate in the above-mentioned activities and who have positive knowledge of the aims and activities or the criminal intentions of the organized criminal group. In practice, this will generally require proof that the accused became involved in the organized criminal group for the purpose of supporting its criminal objectives. This requirement also suggests that the accused must have some prior knowledge of the organized criminal group's criminal activity. On the other hand, the mental elements exclude from liability any person who may unwittingly contribute to an organized criminal group or who is recklessly indifferent about the nature and activities of the group. In accordance with article 34, paragraph 3, States parties to the Convention are, however, at liberty to lower the mens rea requirement and expand liability to recklessness, negligence or even strict liability without proof of a mental element. In the case of "recklessness", the defendant only foresaw the possibility that his or her actions might contribute to the activities of an organized criminal group. In "objective negligence", the

[9] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, paras. 61-64.

defendant failed to exercise the necessary caution expected from other, ordinary persons.

38. The application of article 5, paragraph 1 (a)(ii), thus allows for the liability of persons who are more remotely connected to criminal activities. For liability under this offence to arise, it is not required for any criminal offences to have been planned, prepared or executed. Article 5, paragraph 1 (a)(ii), attaches criminal liability to events that occur well before the preparation (and sometimes before the planning) of specific individual offences. Subparagraph (ii) thus creates an avenue to hold low-level enhancers and facilitators of organized criminal groups criminally responsible for their contributions. Furthermore, there is no requirement to demonstrate an overt act, which, as mentioned earlier, limits the application of the conspiracy offence in some jurisdictions. Article 5, paragraph 1 (a)(ii), thus renders liable organizers and financiers of organized criminal groups who are not physically involved in the criminal activities of such a group, but who control, plan and "mastermind" its operations.

IV. Extended forms of criminal liability

A. Criminal liability for participation in the commission of a serious crime involving an organized criminal group

39. Article 5, paragraph 1 (b), of the Convention extends criminal liability to persons who provide advice or assistance with respect to the commission of serious crimes involving such a group. This specifically includes persons intentionally "organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group". Article 5, paragraph 1 (b), thus enables the prosecution of leaders, accomplices, organizers, and arrangers, as well as lower-level participants, in the commission of serious crime.

40. "Aiding, abetting, facilitating or counseling" covers secondary parties and accomplices who are not themselves principal offenders. "Organizing" and "directing", on the other hand, are extensions not commonly found (or defined) in national laws. To that end, article 5, paragraph 1 (b), is intended to ensure the liability of leaders of organized criminal groups who give orders relating to, but do not themselves engage in, the commission of the actual crimes.[10]

B. Liability of legal persons

41. Complex corporate structures can effectively hide true ownership, clients or particular transactions related to organized criminal activities. Individual executives may reside outside the country where the offence was committed, and responsibility for specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of transnational organized crime is to introduce liability for legal entities.[11]

[10] Ibid., para. 66.

[11] Ibid., paras. 240-243.

42. Article 10 of the Convention serves as a tool to hold corporations (that is, legal persons) responsible for participation in serious crimes involving organized criminal groups. At the time the Convention was developed, corporate criminal liability was less widely recognized than it is today and, therefore, article 10, paragraph 2, allows States parties to choose whether the liability of legal persons is of a criminal, civil or administrative nature (or any combination thereof).

43. Measures to hold legal persons liable are designed as an additional, not an alternative, tool to the criminal liability of natural persons who have committed offences under the Convention. Article 10, paragraph 3, specifically states that the liability of legal persons "shall be without prejudice to the criminal liability of the natural persons who have committed the offences".

V. Issues and challenges

44. Since it was concluded in 2000, the Convention has found widespread support and adoption. A great number of countries have implemented the requirements under the Convention, thus closing many loopholes relating to the criminalization of organized crime. Experience has shown that the offences set out in article 5 can be adapted to a variety of legal systems and that this provision can be used as a tool to effectively prevent and combat transnational organized crime.

45. Nevertheless, the implementation of provisions based on article 5 has not been without controversy. The complexity of those offences also provides challenges to national lawmakers, who may need to adjust the international requirements to domestic settings and to comply with constitutional requirements. National legislators also need to ensure that their laws are flexible enough to capture the full spectrum of organized criminal activity, while preventing these laws from being too vague and overly broad. The following sections illustrate and reflect on some of the main issues and challenges that have emerged since the inception of the Convention and offer some examples of promising practices in addressing these points.

A. Scope

46. A common concern regarding the types of offences promulgated by article 5 of the Convention is the potential scope of the provisions that criminalize agreements to commit crime and participation in an organized criminal group. The figure following paragraph 4 above illustrates how these offences significantly extend the established spectrum of criminal liability, which in turn raises questions about where criminal liability for these offences should begin and where it should end.

1. Vagueness and overly broad nature

47. The wide scope of many offences under article 5 has been criticized for being overbroad. Many provisions and elements have been described as vague and their meaning as uncertain, given their rationale and nature. Moreover, some jurisdictions have formulated deliberately broad criminal provisions to allow for flexible application to various types of organized criminal groups and to capture different types of association. The common concern, however, has been that the breadth of the offences is so extensive and the interpretation of terms so broad that almost any

person who associates with organized criminal groups could be targeted by these laws, regardless of how close or distant their association may be.

48. The source of this concern is frequently the use of vague and wide-ranging terms to express the conduct element of the offence. For example, some jurisdictions use terms such as "participating in" and "associating with" organized criminal groups without clearly defining what constitutes "participation" and "association". As a result, the scope of the offence becomes so broad that it potentially criminalizes both persons who are intimately involved with the group and those who are only distantly connected to it. Offences that are formulated in this vague and broad manner are difficult to reconcile with the requirement of the rule of law and the principle of legality, namely that criminal law should be sufficiently clear for individuals to be able to distinguish between those acts which will infringe the norms that it lays down and those which will not. In other words, these offences are not always sufficiently precise about which conduct is criminal and which is not.

49. Clear definitions and qualifications placed on relevant elements are a simple way of avoiding criticism for being vague and overbroad and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges. In this context, a promising practice adopted by some jurisdictions is the requirement of "active participation" in an organized criminal group.

50. Also important in this context are the mental elements that accompany the physical elements of the offence. The chapeau of article 5, paragraph 1, specifically states that criminal offences must be committed intentionally, and, although States parties are at liberty to lower the required threshold for the mental elements,[12] great caution should be exercised in order not to criminalize those individuals who, through their conduct, contribute to or otherwise associate with an organized criminal group unwittingly or through no fault of their own. It is for this reason that the domestic offences of most jurisdictions require proof of subjective mental elements such as intention, knowledge or recklessness (that is, acting despite foresight that harm may occur). These elements recognize the individual guilt or blameworthiness of the accused.

51. In summary, a careful combination of clearly articulated physical and mental elements serves to establish precise boundaries of criminal liability, while addressing the shortcomings of existing laws that do not capture the activities of directors, financiers and others situated at the top of the organizational structure of criminal groups.

2. Guilt by association

52. The offences under article 5 and their domestic counterparts have also come under frequent criticism for creating guilt by association and thus potentially violating the right to presumption of innocence. There is a widely held view that, if designed poorly, the offences relating to participation and membership, association and support of organized criminal groups can penalize people simply for their connection to illegal entities, thus violating basic human rights and civil liberties. In several jurisdictions, criminalization provisions relating to organized crime have been challenged before domestic courts because of potential violations of article 22.

[12] Article 34, paragraph 3.

paragraph 1, of the International Covenant on Civil and Political Rights, which states that "everyone shall have the right to freedom of association with others", and of article 14, paragraph 2, of the Covenant, which states that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".[13]

53. Offences that do not adequately recognize the types and levels of involvement a person may have with an organized criminal group are most at risk of violating international and national human rights law and of being overturned by the courts. As mentioned earlier, offences that base criminal liability on mere participation and association do not articulate clear boundaries and do not conclusively answer the question of how remotely a person can be connected to an organized criminal group and still be liable for participation.

54. A promising practice that has emerged in several States parties is the differentiation between different types of participation in and association with an organized criminal group. Some jurisdictions, for instance, have a separate offence for persons who establish, direct or otherwise lead an organized criminal group. Persons who commit a criminal offence on behalf of an organized criminal group are often liable under a separate offence (sometimes referred to as the "soldier offence"), while still other separate offences are set up for those who provide material support to such a group with the knowledge of its criminal activities and objectives. These offences not only serve to avoid criticism related to "guilt by association", but also reflect the different roles and levels of seniority different persons may have in an organized criminal group.

3. Double inchoate liability

55. A further point of concern relating to offences based on article 5, paragraph 1, of the Convention pertains to the creation of criminal liability by way of attempt, incitement and conspiracy. As discussed earlier, the purpose of both models of participation set out in article 5 is to expand criminal liability to cover the planning and preparation activities of organized criminal groups and to hold liable persons who are involved in such a group without committing a criminal offence themselves. This is achieved by creating additional offences that place liability on an agreement to commit a crime or on participation in an organized criminal group.

56. A technical but very important question raised by the creation of these additional offences is whether it is also possible to attempt, incite or conspire to commit these offences. For example, is it possible — and should it be criminalized — to attempt to participate in an organized criminal group? Is it or should it be a criminal offence to try to incite another person to enter into an agreement to commit a future crime? These are essential conceptual questions that need to be explored and firmly answered at the implementation stage of the criminal provisions. Although the Convention does not provide guidance on this point, it is generally considered that it is not permissible to create so-called "double inchoate liability", that is, attempting, conspiring to commit or inciting a criminal offence that itself is a preparatory crime. Put simply, it is not considered a good practice to criminalize

[13] The Convention does not deal with prohibition of membership in specific organizations. See *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 49.

"attempting an attempt" because such offences would be so far removed from any actual criminal activity, any actual harm and any potential social danger that they generally would not warrant and do not justify criminalization.

B. Elements and implementation

57. In addition to the more general, conceptual challenges described above, several concerns relating to the implementation and design of the offences set out in article 5, paragraph 1, of the Convention can be identified. These concerns are not the same for the two types of offences set out in article 5, paragraph 1 (a)(i), and article 5, paragraph 1 (a)(ii), and are explored separately in the following paragraphs.

1. Article 5, paragraph 1 (a)(i): the agreement model

58. One of the practical advantages of the conspiracy offence, and thus of article 5, paragraph 1 (a)(i), is that it offers a means of targeting the master plan of criminal activities, i.e. the agreement, rather than limiting liability to isolated substantive offences. Conspiracy recognizes the connection between different individuals and different crimes by allowing the merging of the prosecution of several charges against multiple persons.

59. The difficulty resulting from this combining of offences and offenders is the complexity of conspiracy prosecutions and trials. Proving the elements of offences based on article 5, paragraph 1 (a)(i), can be difficult for certain types of involvement in an organized criminal group. Three main challenges to successful prosecutions arise in this regard. First, the "agreement model" cannot be used to charge persons who are not part of the agreement. In practice, this may exclude from liability low-ranking members who are not privy to the agreement and are not involved in the planning of criminal activities. Even if they have some knowledge of, or are reckless about the existence of, the agreement, there can be no liability as long as they are not a party to it.

60. Second, in those jurisdictions which require proof of an overt act committed in furtherance of the agreement, as many jurisdictions do, it becomes difficult to target high-ranking members of organized criminal groups who mastermind the activities but who are not involved in executing the plans and thus do not engage in any overt acts.

61. A third problem with the "agreement model" stems from the fact that senior members of an organized criminal group may give instructions about the general type and nature of criminal activities to be carried out, but their planning and instructions may not involve specific details about individual operations. Domestic laws relating to conspiracy thus frequently struggle to capture multifaceted criminal enterprises in which the agreement between the leading figures lacks a certain level of specificity.

62. It is fair to say that, in the light of these practical and long-standing difficulties, the "agreement model" set out in article 5, paragraph 1 (a)(i), has proven to be less popular among States parties than the "participation model" under article 5, paragraph 1 (a)(ii). It is for this reason that some jurisdictions, especially

those with common-law traditions, have adopted an offence based on article 5, paragraph 1 (a)(ii), in addition to existing conspiracy provisions. In some countries, however, conspiracy remains the primary offence for capturing persons involved in organized criminal groups.

63. Some States have sought to address these difficulties by amending their existing conspiracy provisions following ratification of the Convention. This has led in some instances to the creation of offences that are so broad that they criminalize almost any kind of agreement, thus departing from the fundamental purpose of the Convention and creating criminal liability without precise boundaries.

64. The UNODC Model Legislative Provisions against Organized Crime set out a promising model for the implementation of article 5, paragraph 1 (a)(i), in domestic law which limits the scope of the offence to agreements that are made "in order to obtain, directly or indirectly, a financial or other material benefit".[14]

2. Article 5, paragraph 1 (a)(ii): the participation model

65. Some of the difficulties in designing and implementing the offence under article 5, paragraph 1 (a)(ii), of the Convention relate to the element that describes the relationship between the accused and the organized criminal group. As mentioned earlier, some jurisdictions base criminal liability on loosely termed elements such as "participation" and "association", which raises concerns over the level of involvement necessary for criminal liability to arise.

66. A further question to be addressed in this context is whether liability for offences based on article 5, paragraph 1 (a)(ii), should be limited to active participation or also extend to passive participation and to participation by mere presence. While article 5, paragraph 1 (a)(ii), makes specific reference to "taking an active part", some jurisdictions have formulated their domestic offences in a much broader manner to include, for example, persons who are bystanders observing the activities of an organized criminal group and persons who provide support that is not directly linked to any criminal activity. While the use of broader terms and interpretation may allow for more flexible (and more frequent) application of relevant criminal provisions, it is debatable whether persons who, for example, watch and witness the criminal activities of an organized criminal group without either contributing to or disrupting them should be criminally liable for "participation in an organized criminal group". The general view adopted by most States parties appears to be that passive participation by persons who are not members of the organized criminal group is not sufficient to justify prosecution and punishment.

67. A promising practice found in the laws of several jurisdictions is the differentiation between types and levels of involvement in an organized criminal group. Under this format, more serious offences are reserved for persons who direct and mastermind the group's activities, while separate offences are used for those who carry out criminal offences on the group's behalf and for those who support the criminal activities in other ways. An additional practice is to limit liability for participation to members of organized criminal groups, so that persons more remotely connected to the group will not be held criminally liable.

[14] Model Legislative Provisions against Organized Crime (United Nations, New York, 2012).

68. A related issue is the threshold established by the mental element of the participation offence. As mentioned earlier, many jurisdictions adopt the standard set in the chapeau of article 5, paragraph 1, so that the participation has to be intentional and with knowledge of the nature of the participation. This limits liability to intentional contributions to organized criminal groups and excludes persons who may have contributed to the group unwittingly. States parties differ in their inclusion of recklessness or other forms of indirect intention. This makes it possible to hold criminally liable people who have some awareness that their participation could or might contribute to the criminal activities of the group but who do not have certainty or actual knowledge about these consequences. The purpose of lowering the mental element in this way is to deter potential offenders and send the message of "when in doubt, stay away".

3. Aggravations

69. In addition to the basic participation offence, several States parties have introduced separate provisions to capture other types of involvement in an organized criminal group. Frequently, these offences are aggravations to the participation offence and provide higher penalties for persons who are more intimately involved with the organized criminal group or who occupy a senior role and are thus seen as more blameworthy than "ordinary" participants.

70. The most significant aggravation found in many jurisdictions is a separate offence for directors and leaders of organized criminal groups. These offences may also be seen as a reflection of article 5, paragraph 1 (b), which mandates the criminalization of "organizing" or "directing" the commission of serious crime involving an organized criminal group. These aggravations have important practical and symbolic meaning in that they provide specific offences and/or higher penalties for senior members and others occupying key functions in the organized criminal group.

71. A promising practice emerging in some jurisdictions is the implementation of other aggravations that criminalize specific types of involvement in an organized criminal group, such as financing the criminal activities and recruiting new members. It is also common for domestic law to combine existing offences with an element relating to the involvement of an organized criminal group, so that offences such as robberies, trafficking in persons or supplying illicit drugs are aggravated if they are carried out by such a group.

C. Scope and application

72. A final issue that has sparked particular controversy regarding the scope and application of article 5 of the Convention and domestic laws to counter organized crime stems from the way in which "organized criminal group" and similar terms have been defined, interpreted and applied. Although article 2, paragraph (a), of the Convention has established a universally accepted definition of the term, debate and uncertainty about the scope and application of the term continues.

73. Much of the discussion centres on the question of to what extent, if any, groups involved in political activism, protests or terrorist activities can be regarded as "organized criminal groups", so that the offences and other measures set out in

the Convention and its domestic equivalents can be utilized to criminalize and combat these types of associations. This question is of great practical significance, especially in jurisdictions that have charged or have sought to charge different types of associations, as well as terrorist organizations, with offences designed to criminalize participation in an organized criminal group.

74. The Convention itself and the extensive material interpreting the Convention and assisting States parties in their implementation efforts provide guidance on this point. Importantly, the purpose element of the definition of "organized criminal group" in article 2, paragraph (a), of the Convention establishes a firm connection to the "financial or other material benefit" as the main motivation of these groups. This, in turn, means that groups with purely political or social motives, and crimes that are not economically motivated, such as environmentally or politically motivated offences, fall outside the scope of the definition. Similarly, the Convention has no application to groups and offences that are motivated primarily by ideology, rather than profit. The Convention should not be used as a pretext to eliminate political rivals, criminalize protest and advocacy or outlaw social groups. It may, however, apply to crimes covered by the Convention and committed by those groups in order to obtain financial or material benefits.[15]

75. A further issue that has arisen in some jurisdictions stems from the practice that the finding by one court that an organization is an organized criminal group is then adopted without further investigation in later, separate trials. This may lead to the continued labelling of certain groups and a perception that "once an organized criminal group, always a criminal group". While the rules of precedent may dictate that the same interpretation be adopted in future decisions, the question of whether a group of persons in a particular situation constitutes an organized criminal group should be made on a case-by-case basis, depending on the specific circumstances.

VI. Conclusion

76. Offences designed to penalize involvement in organized criminal groups are an important tool to combat organized crime within and across international borders. The offences set out in article 5 of the Organized Crime Convention are part of an ambitious strategy to prevent and suppress transnational organized crime worldwide.

77. The present background paper has sought to illustrate that, while different models have been adopted by the States parties to the Convention, the common feature of these offences is that they are designed to target the structure, organization, members and associates of organized criminal groups.

78. The implementation of these offences is driven by the realization that punishing individual offenders after criminal offences have been committed does little to dismantle the organized criminal groups behind these illegal activities. In contrast, the offences set out in article 5 of the Convention are preventive. Criminalizing participation in an organized criminal group creates an avenue to pre-empt and prevent further criminal activities by the group and deter existing and

[15] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 59.

potential associates. The offences allow law enforcement agencies to intervene earlier, before a criminal group commits specific offences. The information given in the present paper seeks to assist States parties in their efforts to set up or assess their normative framework to combat organized crime.